United Mine Workers of America *and* Stag Construction Company and United Steelworkers of America, AFL–CIO, CLC

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United Mine Workers of America, Local 2293 *and* Stag Construction Company and United Steelworkers of America, AFL–CIO, CLC. Cases 6–CD–899–1, –2, –3

November 24, 1993

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed by the Employer, Stag Construction Company, alleging that the Respondents, United Mine Workers of America; United Mine Workers of America, District 2; and United Mine Workers of America, Local 2283 (collectively Mine Workers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees they represent rather than to employees represented by United Steelworkers of America, AFL–CIO, CLC (Steelworkers). The hearing was held June 9, 1993, before Hearing Officer Leone P. Paradise. Thereafter, the Employer and Mine Workers filed briefs.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, Stag Construction Company, a Pennsylvania corporation with a place of business in Belle Vernon, Pennsylvania, is a contractor engaged in the industrial and commercial construction industry which constructs and restores gas pipelines and engages in bathhouse construction work. During the 12-month period ending May 31, 1993, the Employer, in the course and conduct of its business operations, performed services valued in excess of $50,000 in States other than the Commonwealth of Pennsylvania and derived gross revenues in excess of $1 million. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties stipulated, and we find, that Mine Workers and Steelworkers are labor organizations within the meaning of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer is a general contractor which has performed pipeline construction, excavation, and site development work since about 1973. The Employer employs 75–100 employees who have been covered by a series of collective-bargaining agreements with Steelworkers. The most recent agreement between the Employer and Steelworkers is effective from March 1, 1992, through February 28, 1995.

Keystone Coal Mining Corporation (Keystone), a subsidiary of Rochester and Pittsburgh Coal Company (R&P), awarded the Employer a contract to perform the overall site development work for Keystone's new Plum Creek Mine. The Employer's work on the project involves the removal of about 900,000 tons of earth to expose the coal seam, the installation of several sedimentation ponds, and the construction of coal handling and parking areas.

In late April 1993,[1] the Employer began work at the Plum Creek project using about 15 employees, at least 10 of whom are members of Steelworkers.[2] Although the Employer had not previously done a complete site development project such as Plum Creek, the Employer has performed various construction and earthmoving projects involving similar work, albeit on a smaller scale, for Keystone and other companies. At the Plum Creek site, Stag is using both its own equipment and equipment leased at fair market value from Kent Coal Mining (Kent) which, like Keystone, is a subsidiary of R&P. The Employer's leased equipment includes a Hitachi X-1100 excavator and four rock trucks.

Beginning on May 25, the Mine Workers began what it denominated as an unfair labor practice strike against Keystone and Keystone's parent corporation, R&P. The Mine Workers initially did not picket the Plum Creek site involved in this case. On June 1, at 6:30 a.m., about 12–15 pickets led by Mine Workers' officials, John McCullough, a District 2 board member, and Richard Fink, president of Local 2293, appeared at the entrance to the Plum Creek jobsite. McCullough told the Employer that ''this job was shut down due to labor problems'' and that ''the bunch of men that were there—to run the equipment, these were Kent Coal employees.'' McCullough also said that ''if [the Employer] wanted to continue working, [it] had to hire these employees. If not, this place was on strike.'' The pickets carried signs stating, ''Unfair Labor Practice Strike Against R&P.'' The Mine Workers' picketing, which continued on a daily basis from June 1 to 7, resulted in a work stoppage at the project. Thereafter, on

[1] All dates are in 1993, unless otherwise noted.

[2] Three of the employees on the job had not completed their contractual 90-day probationary period.

the morning of June 9, about 35–40 Mine Workers pickets appeared at the jobsite. The Employer called the police, but the pickets disbursed before police arrived. The Employer then resumed work on the project without any further interruption.

B. *Work in Dispute*

The parties stipulated that the disputed work involves the excavation and removal of dirt with heavy equipment and preparation of a site portal at Keystone Mining Company's Plum Creek No. 1 Mine in preparation for the construction of an underground mine.

C. *Contentions of the Parties*

The Employer claims that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated because the Mine Workers demanded the disputed work and then picketed the Plum Creek jobsite. The Employer argues that the disputed work should be awarded to Steelworkers-represented employees based on its collective-bargaining agreement with Steelworkers, its preference and past practice, and efficiency and economy of operations.

During the hearing, a Steelworkers' representative stated that ''we should be working this job and that we're not a [sic] jurisdictional dispute with the Mine Workers and we feel that we have rights to be there as Steelworkers on this project.'' He then withdrew his appearance on Steelworkers' behalf and left the hearing room.

Mine Workers argues that there is no reasonable cause to believe that it has violated Section 8(b)(4)(D) of the Act. According to Mine Workers, it lawfully picketed the jobsite in protest of the substandard wages the Employer was paying to Steelworkers-represented employees and in support of its ''unfair labor practice and economic strike against R&P and its subsidiaries, including Keystone.'' Mine Workers also claims that Board Member McCullough exceeded his authority and the instructions given him by International Representative Jeffrey Duncan and Local 2 President Nicholas Molnar when he demanded the disputed work on behalf of Mine Workers-represented employees. Additionally, Mine Workers contends that the Board should quash the notice of hearing, as it did in *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818 (1986), on the ground that the real dispute here is between the Mine Workers and Keystone and involves nothing more than Mine Workers' attempt to enforce the no-subcontracting clause in their collective-bargaining agreement. Mine Workers further asserts that there is no existing work assignment dispute in this proceeding because it has disclaimed the disputed work. Even assuming that reasonable cause exists to believe that Section 8(b)(4) has been violated, Mine Workers contends that the work should be awarded to employees it represents based on evidence that they possess the requisite skills and have customarily performed such work and because arbitrators have awarded similar work to Mine Workers-represented employees.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated, and that the parties have no agreed-upon method for the voluntary adjustment of the dispute.

The evidence shows that McCullough, a District 2 board member for Mine Workers, effectively told the Employer that Mine Workers was picketing in support of its demand for the disputed work. Although Mine Workers claims that McCullough exceeded his authority when he made these remarks, we find it unnecessary to decide whether Mine Workers is legally responsible for McCullough's conduct as the Board, in a jurisdictional context, is not charged with finding that a violation actually occurred, but only that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. Additionally, we stress that during the hearing Molnar, whose authority Mine Workers claims McCullough exceeded in demanding the disputed work, specifically testified ''that we have equipment on the site that belonged to Kent Coal Company and that our people should be running it.''

Mine Workers also argues that the Board should examine the real nature of the instant dispute and that such an inquiry here reveals that the dispute is really a contractual, not a jurisdictional, dispute. We find that Mine Workers' reliance on *USCP-Wesco*, above, to support its argument is misplaced because the present case presents a traditional 10(k) situation in which Mine Workers has picketed in support of its demand that the Employer assign the disputed work to employees represented by Mine Workers rather than to the Employer's own Steelworkers-represented employees who were performing the work. *USCP-Wesco* is also distinguishable here because, unlike the situation in that case, the evidence fails to establish that Mine Workers was engaged in work preservation when McCullough demanded the disputed work. We note that the record does not show that employees represented by Mine Workers have performed in the past the specific kind of work which constitutes the work in dispute here. For these reasons, we conclude that there are competing claims for the disputed work between rival groups of employees and that, therefore, a traditional jurisdictional dispute exists.

Regarding the Mine Workers' purported disclaimer of the disputed work, we note that the Mine Workers did not offer it until several weeks after the close of the hearing. Thus, it appears that Mine Workers is at-

tempting to escape the consequences of its picketing by avoiding ''an authoritative decision on the merits'' in this case.[3] Furthermore, Mine Workers' purported disclaimer specifically reserved the right ''to engage in protected concerted activity to protect the jobs of the displaced Kent employees'' and ''to continue to pursue grievances against Kent Coal and Keystone Coal for illegal subcontracting . . . .'' We therefore conclude that the language of the disclaimer is inconsistent with Mine Workers' claim that it no longer seeks the disputed work for employees it represents.[4]

For the reasons stated above, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. We additionally note that the parties have stipulated that there is no provision for the voluntary resolution of the instant dispute which would bind all three parties to the dispute. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

There is no claim that either of the Unions has been certified by the Board to represent the employees of the Employer.

Sections 2A and B of the Employer's existing collective-bargaining agreement with Steelworkers provide, inter alia, that the contract applies to ''[h]eavy construction work [which] is defined as constructing substantially and [in] its entirety any fixed structure and other improvement or modification thereof, or any addition or repair thereto, including . . . excavation and disposal of earth and rock . . . .'' We find that the Employer's contract with the Steelworkers covers the disputed work. The Mine Workers, by contrast, does not have a collective-bargaining agreement with the Employer.

Thus, although the factor of Board certifications is neutral, we find that the collective-bargaining agreement between the Employer and Steelworkers favors an award of the disputed work to Steelworkers-represented employees.

2. Employer preference and past practice

The Employer has historically assigned the disputed work to employees represented by Steelworkers and prefers to continue this work assignment. We therefore conclude that both factors favor an award of the disputed work to these employees.

3. Area and industry practice

The Employer does not claim that area practice favors an award to either competing group of employees. Although the Mine Workers states ''that the work is customarily performed by UMWA members,'' it does not present any specific evidence to establish that either area or industry practice favors an award to Mine Workers-represented employees. Thus, we find that these factors are neutral and do not support an affirmative award of the disputed work.

4. Relative skills

There is no contention that either group of employees lacks the requisite skills to perform the disputed work. Thus, this factor is also inconclusive and does not support an affirmative award of the disputed work.

5. Efficiency and economy of operations

The Employer contends that this factor favors an award to employees represented by Steelworkers because they work around the clock for 7 days each week and because they are capable of performing the multiple functions required by the Employer's three job classifications. Because the Employer does not contend that the Mine Workers-represented employees are incapable of performing the disputed work, we believe that these employees also would have the ability to perform this work under the specific conditions that the Employer has set for the Plum Creek jobsite. We therefore conclude that this factor is also neutural, and does not favor an award to either competing group of employees.

6. Arbitration awards

Although Mine Workers relies on several arbitration awards to support its claim that the disputed work should be awarded to Mine Workers-represented employees, we note that the Employer was not a party to any of these proceedings. Accordingly, we find that this favor does not favor an award to employees represented by Mine Workers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by United Steel-

[3] See *Electrical Workers IBEW Local 3 (Mike G. Electric)*, 279 NLRB 521, 523 (1986).

[4] See *Iron Workers Local 197 (Del Guidice Enterprises)*, 291 NLRB 1, 2 (1988).

workers of America, AFL–CIO, CLC are entitled to perform the disputed work. We reach this conclusion relying on the Steelworkers' collective-bargaining agreement with the Employer, as well as the Employer's preference and past practice.

In making this determination, we are awarding the work in dispute to the Employer's employees who are represented by United Steelworkers of America, AFL–CIO, CLC, but not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Stag Construction Company represented by United Steelworkers of America, AFL–CIO, CLC are entitled to perform the work involved in the excavation and removal of dirt with heavy equipment and preparation of site portal at Keystone Mining Company's Plum Creek No. 1 Mine in preparation for the construction of an underground mine.

2. United Mine Workers of America; United Mine Workers of America, District 2; and United Mine Workers of America, Local 2293 are not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Stag Construction Company to assign the disputed work to employees represented by it.

3. Within 10 days from this date, United Mine Workers of America; United Mine Workers of America, District 2; and United Mine Workers of America, Local 2293 shall notify the Regional Director for Region 6 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.